Supreme Court, U.S.
FILED
071349 APR 23 2008
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No. 07-

IN THE
Supreme Court of the United States

CHARLES SCOTT,

Petitioner,

v.

JAMES MERCIER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRED S. CLARK
CLARK AND CLARK
P.O. Box 8151
Savannah, GA 31412
(912) 233-0300

Attorneys for Petitioner

215484

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

In this action, the Appellate Court affirmed the decision of the United States District Court Southern District of Georgia Waycross Division holding that a deputy sheriff who arrived in an official vehicle of the Sheriff's Department at the home of the Plaintiff and was wearing his uniform and badge and carrying a weapon, was entitled to go upon the Plaintiff's property where his home was situated without a warrant and without a crime being committed in the presence of the deputy sheriff and remain on the property after he was instructed to leave and physically attacked the Plaintiff from behind by slamming his face into the wall of his house. Questions presented are:

(1) Did the Court err in affirming the judgment of the trial court that Eleventh Amendment sovereign immunity applied even though the Sheriff is a County official and his office and the County are not arms of the state?

(2) Did the Court err in granting sovereign immunity to the Defendant because the Plaintiff failed to challenge an official policy or practice of the Brantley County Sheriff's Office which, it is submitted, should have been unnecessary and futile because no law enforcement supervisory official would have a policy permitting the law enforcement officer to go upon a person's private property without permission when no crime is being committed and without a warrant and at that time and place strike a person who is not committing a crime and who is on his own property as such a policy would support unlawful and unconstitutional acts.

In addition the Court's ruling was contrary to a decision of the Supreme Court of Georgia which is the highest court of Georgia which decision stated that an officer performing a discretionary act is entitled to official immunity unless he or she "acted with actual malice or with intent to cause injury." *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996).

Likewise, the Court's holding is contrary to 42 U.S.C. § 1983 authorizing suits to redress deprivations of civil rights by persons "acting" under color of any "state statute, or regulation, custom, or usage". 42 U.S.C. § 1983. Section 1983 imposes liability upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia". Id. The "under color of state law" element of a prima facie case requires a plaintiff to show that the defendant acted under color of state law or pursuant to a custom or usage having the force of law. *Adicks v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970). The same case held that to act under color of state law does not require that the defendant be an officer of the state, but only a willful participant in joint activity with a state or its agents. *Adicks v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970). Further, this Court ruled that the Plaintiff is not required to show some authority under state law, state custom, or state usage purporting to justify the action of the state's constitution or laws. A police officer's exercise of arbitrary or excessive force or a government official's discretionary abuse of power which goes beyond the scope of his or her authority will usually have been performed under color of state law

for purposes of Section 1983 liability. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) overruled on other grounds by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). In *Monroe*, police officers were held to have acted under color of state law in making a patently unlawful search and arrest. Likewise in an opinion of this Court in *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770 (1964) this Court found that there was State action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, identified himself as a deputy sheriff and wrongfully arrested Black park patrons who refused to leave the park in response to the order.

Further this Court held that constitutional liability attached to those wrongdoers who "carry a badge of authority of [the government] and represented in some capacity". *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191, 109 S. Ct. 454 (1988). Likewise this Court held that a Defendant acts under a color of state law when he abuses a position given to him by the state. *West v. Atkins*, 487 U.S. 42, 5108 S. Ct. 2250 (1988).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
A. Statement of Facts	5
B. Standard of Review	6
REASONS FOR GRANTING THE PETITION	8
I. The District Court Erred in Granting Defendant's Amended Motion for Summary Judgment.	8

Contents

Page

A. A conflict exists in the case law as decided in the Eleventh Circuit, Supreme Court of Georgia and United States Supreme Court on the issue of Eleventh Amendment Sovereign Immunity and the issue has been wrongly decided in the underlying case to the prejudicial detriment of Appellant. 8

B. The Trial Court Erred in Finding that Defendant in his position as a deputy sheriff in the state of Georgia is an "Arm of the State" and therefore, Entitled to Eleventh Amendment Immunity. 16

II. The correct test for determining whether a political subdivision of Georgia is an "arm of the state" was not applied by the lower courts in deciding this case. 18

CONCLUSION 20

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed March 10, 2008 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Georgia, Waycross Division Dated And Filed September 14, 2007 ..... 4a

Appendix C — Order Of The United States Court Of Appeals For The Elevent Circuit Denying Petition For Rehearing Filed April 3, 2008 ..... 13a

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co.,
398 U.S. 144, 90 S. Ct. 1598 (1970) ..... ii, 8

Bd. of Comm'rs of Randolph County v. Wilson,
260 Ga. 482, 396 S.E.2d 903 (1990) 17

Carr v. City of Florence, Ala.,
916 F.2d 1521 (11th Cir. 1990) 18

Cole v. Central Data Corp.,
947 F.2d 313 (C.A. 87) 7

Cottrell v. Caldwell,
85 F.3d 1480 (11th Cir. 1996) 12

Courson v. McMillian,
939 F.2d 1479 (11th Cir. 1991) 11

Graham v. Connor,
490 U.S. 386, 1009 S. Ct. 1865 (1989) .....
..... 7, 10, 11, 12, 14

Grech v. Clayton County,
335 F.3d 1326 (11th Cir. 2003) 17

Griffin v. Maryland,
378 U.S. 130, 84 S. Ct. 1770 (1964) ..... iii, 9

Cited Authorities

	Page
Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982)	11
Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), *reh. denied*, 659 F.2d 1079 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982)	9
Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000)	6
Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151 (1995)	7
Jordan v. Mosley, 487 F.3d 1350 (11th Cir. 2007)	13
Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002)	11
Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003)	16, 17
Merrow v. Hawkins, 266 Ga. 390, 467 S.E 2d 336 (1996)	ii, 11
Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978)	iii, 9
Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961)	iii, 8, 9

Cited Authorities

Page

National Collegiate Athletic Assn. v. Tarkanian,
488 U.S. 179, 109 S. Ct. 454 (1988) ..... iii, 10

Northern Insurance Company of New York v. Chatham County, 547 U.S. 189,
126 S. Ct. 1689, 164 L. Ed. 2d 367 ..... 17, 19

Reed v. Hoy,
909 F.2d 324 (9th Cir. 1990) 11

Rich v. Dollar,
841 F.2d 1558 (11th Cir. 1988) 11

Rodriguez v. Ritchey,
539 F.2d 394 (5th Cir. 1976) 13

Santos v. Gates,
287 F.3d 846 (9th Cir. 2002) 12

Shands Teaching Hospital & Clinics v. Beech St. Corp.,
208 F.3d 1308 (11th Cir. 2000) 10, 13, 16

Sheth v. Webster,
145 F.3d 1231 (11th Cir. 1998) 7

Stengel v. Belcher,
522 F.2d 438 (6th Cir. 1975) 10

Tennessee v. Garner,
471 U.S. 1, 105 S. Ct. 1694 (1985) 10

Cited Authorities

Page

Thornton v. City of Macon,
132 F.3d 1395 (11th Cir. 1998) 7, 10, 13, 14, 15

Travelers Indem. Co. v. School Bd. of Dade County, Fla.,
666 F.2d 505 (11th Cir. 1982) 18

Vierling v. Celebrity Cruises,
339 F.3d 1309 (11th Cir. 2003) 18, 19, 20

West v. Atkins,
487 U.S. 42, 108 S. Ct. 2250 (1988) ..... iii, 10

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 18

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C.A. § 1983 ..... *passim*

Cited Authorities

Page

Constitutional Provisions:

Georgia's Constitution,
Art. I, Sec. II, Par. IX (d) 1

Georgia Constitution,
Art. IX, Sec. I, Par. III (a) (b) (a) 3, 17

United States Constitution Amendment IV ....
..... 2, 12, 13, 20

United States Constitution Amendment XI ... *passim*

United States Constitution Amendment XIV ..2, 12, 20

OPINIONS BELOW

The opinion of the United States District Court Southern District of Georgia Waycross Division is styled as *Charles Scott v. Deputy Sheriff James Mercier, Deputy Sheriff of Brantley County*, which is unreported.

The opinion of the Court of Appeals for the Eleventh Circuit containing the same styling is also unreported. Both opinions are set forth in the appendix hereto as is the order denying the petition for rehearing which is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on March 10, 2008 and the order denying the petition for rehearing was entered on April 3, 2008 and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Georgia's Constitution Art. I, Sec. II, Par. IX (d) states,

> . . . all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance or the negligent failure to perform the ministerial functions and may be liable for injuries and damages if they act with

> actual malice, or with actual intent to cause injury in the performance of their official functions . . .

42 U.S.C.A. § 1983 provides that liability is imposed upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory of the District of Columbia".

United States Constitution Amendment IV, the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment XI, the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens in another state, or by citizens or the subjects of any foreign state.

United States Constitution Amendment XIV, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Constitution, Article IX. Sec. I, Par. III (a) (b) (a) . . . sheriff . . . shall be elected by the qualified voters of their respective counties for terms of four years and shall have such qualifications, powers and duties as provided by general law.

County officers listed in sub-paragraph (a) of this paragraph may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law. Minimum compensation for said county officers may be established by the general assembly by general law. Such minimum compensation may be supplemented by local law or, if such authority is delegated, by local law, by action of the county governing authority.

STATEMENT OF THE CASE

Plaintiff-Appellant, Charles Scott (hereinafter "Plaintiff" or "Appellant"), filed a Complaint with the United States District Court for the Southern District of Georgia on May 5, 2006. (R.1) The Scheduling Order of August 11, 2006, set December 23, 2006, as the last date for filing of all civil motions. (R.9). Defendant sought an extension of time to file a Motion for Summary Judgment (R.15) and it was granted, extending the time to file through January 13, 2007. (R.6). Defendant filed a Motion for Summary Judgment on January 12, 2007, based on qualified immunity and Fourth Amendment issues. (R.17). On January 31, 2007, Plaintiff filed a Motion to Amend/Correct his Complaint. (R.23). Plaintiff's opposition to Defendant's Motion for Summary Judgment was filed on February 1, 2007. (R.24-R.25). On February 12, 2007, Defendant filed a

response brief to Plaintiff's opposition to Defendant's Motion for Summary Judgment. (R.29). Plaintiff filed his reply to Defendant's Response to Plaintiff's Opposition to Motion for Summary Judgment on February 28, 2007. (R.30). On March 3, 2007, the Court granted Plaintiff's Motion to Amend Complaint. (R.32). The Complaint, as amended, names Deputy Sheriff James Mercier in his official capacity. (R.33).

On June 28, 2007 the Court set a status conference for June 29, 2007. (R.38). The minutes from the conference were entered on June 29, 2007, but the record indicates that the minutes were modified on July 6, 2007. (R.39). The minutes indicate that there is an outstanding motion for summary judgment and "Defendant says there are outstanding claims not addressed in the present motion for summary judgment. Defendant wants to amend their motion for summary judgment or either file a second motion for summary judgment." (R.39). In the minutes, the trial court directs Defendant to file an addendum to the Motion for Summary Judgment within 3 weeks. (R.39). Defendant filed his Amended Motion for Summary Judgment on July 20, 2007, raising the Eleventh Amendment Sovereign Immunity issue for the first time. (R.41). Plaintiff filed his reply brief in opposition on July 30, 2007. (R.43). On September 14, 2007, the trial judge granted Defendant's motion for summary judgment and the Judgment was entered on September 19, 2007. (R.51-R.52). The Court's order dismissed the claims against Defendant as barred by the Eleventh Amendment. (R.51). On September 21, 2007, Plaintiff filed his notice of appeal. (R.53).

A. Statement of Facts

On or about September 12, 2005, Plaintiff and his wife, were taking care of three children, who were at their home, at the request of their mother and custodial parent, Karen Gibson (Deposition of Marlene Scott ("M. Scott") (M. Scott 15:23-16:1); Deposition of Charles Scott ("Scott") 30:2-3; 36:14-20; 40:8-9). On that date, the Defendant, while acting as deputy sheriff and under color of authority of Georgia law, forcefully entered the property of the Plaintiff, without authority or invitation, and told Plaintiff he was going "in your house and get the kids." (Scott 30:2-3; 39:21-24). Plaintiff did not feel comfortable releasing the children from his charge and asked Defendant if he had a warrant or some other paperwork regarding the children, to which the Defendant stated he was going in the house one way or another and getting the kids. (Scott 42:21- 43:2).

Plaintiff told Defendant that unless he had the proper paperwork, he "was not coming in my house." (Scott 39:16-24; 42:21-25). Defendant then shoved the gate located at the entrance to the Plaintiff's home into Plaintiff, knocking the Plaintiff back from the gate and cutting Plaintiff's arm. (Scott 43:17-44:9). Plaintiff requested that Defendant call the sheriff to the scene and Defendant refused, stating, "I am the law and I am going in that house one way or another." (Scott 44:10-14). Plaintiff told Defendant that unless he had the proper paperwork, he "was not coming in my house." (Scott 39:16-24; 42:21-25).

Both men walked to the porch (Scott 49:20-24) and Plaintiff stated that he would call the Sheriff himself.

(Scott 45:12-14). When Plaintiff turned to open the door to his home, the Defendant violently blind-sided him and shoved Plaintiff's face into the wall of his home. (Scott 48:1-7). This action by Defendant was unprovoked and restrained Plaintiff and Defendant then attempted to spray Plaintiff with mace. (Scott 49:3-5; 50:17-20). At all times relative to this incident, Plaintiff was a free citizen and was not suspected of committing any crimes. Although Plaintiff remained calm, Defendant was aggressive from the time he arrived at the Plaintiff's property. (Scott 46:1-2).

Defendant did not give any warnings to Plaintiff not to enter his house or that he was going to be seized or restrained in any way. (Scott 50:17-18). In fact, the first time Defendant told Plaintiff he could not enter his home was after he had been injured by the Defendant who also threatened him with mace. (Scott 50:17-18). As a direct result of the Defendant's attack and beating of Plaintiff, Plaintiff suffered severe injuries, including bruises, lacerations, injury to his mouth and teeth and a broken nose. (Scott 41:4; 50:8-14).

B. Standard of Review

This Court reviews de novo a district court's ruling regarding Eleventh Amendment immunity. *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000). An appeal of the granting of summary judgment is a de novo proceeding to determine whether the trial court had applied the correct summary judgment standard after all disputed facts are considered in a light most favorable to the non-moving party and giving the respondent all reasonable

inferences and resolving conflicts in his favor. *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998); *Cole v. Central Data Corp.* 947 F.2d 313 (C.A. 87). The Court must answer the legal question of whether a defendant is entitled to qualified immunity under that version of the facts. *Thornton v. City of Macon*, 132 F.3d 1395, 1397 (11th Cir. 1998).

This Court must approach the facts from the plaintiff's perspective because "the issues appealed here concern 'not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law.'" *Sheth*, 145 F.3d at 126 (quoting *Johnson v. Jones*, 515 U.S. 304, 311, 115 S. Ct. 2151, 2155 (1995)). For summary judgment purposes, all claims that law enforcement officers have used excessive force—deadly or not—in the course of any arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard[.]' Whether the amount of force used was reasonable is determined objectively "from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight" and "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 409 U.S. 386, 109 S. Ct. 1864, 1872, 104 L. Ed. 2d 443.

REASONS FOR GRANTING THE PETITION

I. The District Court Erred in Granting Defendant's Amended Motion for Summary Judgment.

A. A conflict exists in the case law as decided in the Eleventh Circuit, Supreme Court of Georgia and United States Supreme Court on the issue of Eleventh Amendment Sovereign Immunity and the issue has been wrongly decided in the underlying case to the prejudicial detriment of Appellant.

Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S. Ct. 473, 476 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation custom, or usage." 42 U.S.C. § 1983. Section 1983 imposes liability upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia." *Id.* The "under color of state law" element of a prima facie case requires a plaintiff to show that the defendant acted under color of law or pursuant to a custom or usage having the force of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, (1970). To act under color of state law does not require that the defendant be an officer of the state, but only a willful participant in joint activity with a state or its agents. *Id.*

The term "under color of law" includes not only action taken by state officials pursuant to state law, but also action clothed with the authority of state law. Thus, the plaintiff is not required to show some authority under state law, state custom, or state usage purporting to justify the actions of the state's constitution or laws. A police officer's exercise of arbitrary or excessive force, or a government official's discretionary abuse of power which goes beyond the scope of his or her authority will usually have been performed under color of state law for purposes of section 1983 liability. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), overruled on other grounds by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

In *Monroe v. Pape*, police officers were held to have acted under color of state law in making a patently unlawful search and arrest. In *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770, (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, and identified himself as a deputy sheriff and wrongfully arrested black park patrons who refused to leave the park in response to his order.

In the context of an arrest made by a police officer, the "action under color of state law" element of the prima facie case often is easily established because of the apparent authority conferred by a police uniform, a police officer's actions while in uniform may be considered actions taken under color of state law even though their ulterior purpose is private and unrelated to legitimate law enforcement ends. *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981), *reh. denied*, 659 F.2d 1079 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982).

The Sixth Circuit has gone even further by holding that when an officer acts pursuant to his official duty, even without identifying himself as a policeman and without a uniform or badge, he engages in state action. *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975). The U.S. Supreme Court held, Constitutional liability attached only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.' *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 109 S. Ct. 454 (1988). A defendant acts under color of state law when he abuses a position given to him by the state. *West v. Atkins*, 487 U.S. 42, 50, 108 S. Ct. 2250 (1988).

Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Shands Teaching Hospital & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). Where a police officer is dispatched to a home regarding a civil matter, the police officer may not lawfully remain on the property once the owner requests that he leave. *Thornton v. Macon*, 132 F.3d 1395, 1399 (11th Cir. 1998). Under that test, the "question is whether an officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting the officer, without regard to any underlying intent or motivation on the officer's part." *Graham v. Connor*, 490 U.S. 386, 1009 S. Ct. 1865 (1989). The Fourth Amendment of the United States Constitution subjects any seizure of a person by an officer, through the use of force, to its reasonableness requirements. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). Accordingly, the reasonableness of a particular

use of force must be judged from the perspective of an objectively reasonable officer. *Reed v. Hoy*, 909 F.2d 324, 328 (9th Cir. 1990) (citing *Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865 (1989)).

The highest court of Georgia held that an officer performing a discretionary act is entitled to official immunity unless he or she "acted with actual malice or with actual intent to cause injury," *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996). In order to receive qualified immunity, the public official "must first prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991)(quoting *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988). If the defendant was not acting within his discretionary authority, he is ineligible for the benefit of qualified immunity. *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002). The Defendant made no statement nor submitted any document that he was acting with the scope of his discretionary authority.

Actual malice in rulings on this issue denotes "express malice or malice in fact." *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 102 S. Ct. 2727, 2729 (1982). Malice was showed by the Defendant striking the Plaintiff forcefully.

Thus, such immunity exists only "insofar as [the officer's] conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Id.*

In this case, Plaintiff's § 1983 claim includes an infringement on his property rights and an excessive force claim as premised upon a clearly established right of which the Defendant should have known, namely the right to be free from unreasonable force as guaranteed by the Fourth and the Fourteenth Amendments to the United States Constitution. It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989); *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996). *Graham v. Connor*, is the seminal case on this issue containing, the most cogent statement of the position of the courts on this important issue. The Court's must balance the force used against the need, to determine whether the force used was "greater than is reasonable under the circumstances." *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002). This determination "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force and because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, the courts have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly. This is because police misconduct cases almost always turn on a jury's credibility determinations. *Id.*

In this case a county deputy sheriff entered property without permission or a warrant and committed an assault and battery on the Plaintiff, and this action was brought against him in his official

capacity. Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Teaching Hospital v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000).

The Eleventh Circuit made a statement in its ruling in favor of the Appellant on the issue of qualified immunity in *Jordan v. Mosley*, 487 F.3d 1350, 1354 (11th Cir. 2007) that would clearly apply to the Appellee deputy sheriff in the instant case. It stated "We first note the obvious fact that Deputy Mosley neither arrested Plaintiff nor obtained the pertinent arrest warrant. In the Eleventh Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment. *Rodriguez v. Ritchey*, 539 F.2d 394, 400 (5th Cir. 1976).

A case decided by the Eleventh Circuit Court in 1998 is factually similar to the instant case and application of the law directly in point with the facts in the ruling made in the trial court. When a police officer is dispatched to a home regarding a civil matter the police officer may not lawfully remain on the property once the owner requests that he leave. *Thornton v. Macon*, 132 F.3d 1395, 1399 (11th Cir. 1998). In *Thornton*, an officer was dispatched to the plaintiff's residence at the request of plaintiff's former girlfriend, who requested police assistance to resolve a civil dispute. *Id.*, at 1397-98. The girlfriend wanted to return a set of keys to the plaintiff in exchange for a mattress she claimed belonged to her, which was in the residence. *Id.* The Court stated that the officer lawfully could peaceably approach the front

door and attempt to deliver the keys and attempt to retrieve the mattress; in doing so he would merely be attempting to mediate and diffuse a contentious situation. *Id.* at 1399. The officer could not force such an exchange and could not remain on the *property* after the plaintiff had refused to make the exchange. *Id.* [emphasis added]. The plaintiff in *Thornton* had committed no crime and had not threatened anyone; once he had asked the officer to leave, the continued presence and attempt to retrieve the mattress by force was not pursuant to the officer's official duties and was outside the officer's authority. *Id.*

This ruling on a § 1983 claim by the Eleventh Circuit Court of Appeals contains facts comparable to the factual events in the instant case and should have been followed by the Eleventh Circuit in the ruling on this case.

In determining whether the Plaintiff's rights were violated in this § 1983 claim, the entitlement to qualified immunity is determined by an objective reasonableness test. *Graham v. Connor*, 490 U.S. 386, 1009 S. Ct. 1865 (1989). Under that test, the "question is whether an officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting the officer, without regard to any underlying intent or motivation on the officer's part." *Id.*

Applying the above test to the facts in this case and construing those facts most favorably to plaintiff as the party opposing summary judgment, we submit that the Court should hold that the entry onto the Plaintiff's property without permission or cause and the use of

force against the plaintiff was not objectively reasonable. The facts, when construed in plaintiff's favor, do not demonstrate that Defendant had probable cause to arrest the plaintiff nor did he have a warrant enabling him to lawfully enter onto the Plaintiff's property before he forcibly struck the Plaintiff. As was stated by the Eleventh Circuit Court in *Thornton*, "no reasonable police officer would have believed that the officer(s) had probable cause to arrest" *Thornton*, at 1399.

This is especially so in the present case where at all times relative to this incident, Plaintiff was a free citizen and was not suspected of committing any crimes. Although Plaintiff remained calm, Defendant was aggressive from the time he arrived at the Plaintiff's property. (Scott 46:1-2). Defendant did not give any warnings to Plaintiff not to enter his house or that he was going to be seized or restrained in any way. (Scott 50:17-18). In fact, the first time Defendant told Plaintiff he could not enter his home was after he had been injured by the Defendant who also threatened him with mace. (Scott 50:17-18).

As a direct result of the Defendant's attack and beating of Plaintiff, Plaintiff suffered severe injuries, including bruises, lacerations, injury to his mouth and teeth and a broken nose. (Scott 41:4; 50:8-14).

B. The Trial Court Erred in Finding that Defendant in his position as a deputy sheriff in the state of Georgia is an "Arm of the State" and therefore, Entitled to Eleventh Amendment Immunity.

The trial court erred when it found that Defendant is an arm of the state. Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Shands Teaching Hospital & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). Defendant and the trial court relied on *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), for the proposition that a Georgia sheriff, in his official capacity, is an arm of the state and that his deputies are therefore protected by the Eleventh Amendment. In addition, the trial court stated that a claim against officers of a County Sheriff's Department is tantamount to a claim against the Sheriff's Department itself and consequently, the Defendant is entitled to Eleventh Amendment immunity.

In *Manders*, an arrestee brought a § 1983 claim against a sheriff in his official capacity after he was allegedly beaten by a sheriff's deputy at the county jail. The Eleventh Circuit held that the sheriff was an "arm of the state" in "establishing use of force policy at the jail and in training and disciplining his deputies in that regard," and was therefore entitled to Eleventh Amendment immunity. *Manders*, 338 F.3d at 1319. In *Manders*, the Eleventh Circuit noted that it was bound by prior panel precedent to treat a Georgia sheriff as an agent of the county, rather than the state, for

purposes of Eleventh Amendment immunity. 285 F.3d at 993. The Eleventh Circuit, however, proceeded to question the correctness of its prior panel precedent on this issue, and concluded that "Georgia sheriffs are agents of the state, not counties, when performing their law enforcement duties as to use of force [in the jail setting]." 285 F.3d at 993. The *Manders* decision only considered the narrow function of "establishing use of force policy at the jail," and the Eleventh Circuit explicitly declined to decide whether county sheriffs are arms of the state for any of their other specific duties. *Manders*, 338 F.3d at 1319; *Scruggs v. Lee*, No. 06 155112007 WL 1745898, *2 (11th Cir. June 15, 2007) (same).

The Eleventh Circuit has not extended *Manders* to all sheriff functions. *See Grech v. Clayton County*, 335 F.3d 1326, 1332 35 (11th Cir. 2003)(plurality en banc decision). The Georgia Constitution designates the sheriff as a "county officer," and the Georgia Supreme Court has held that a county sheriff is a separate constitutional entity. Ga. Const. art. IX § 1, ¶ 3(a) (b); *Bd. of Comm'rs of Randolph County v. Wilson*, 260 Ga. 482, 482, 396 S.E.2d 903 (1990). Furthermore, this Court has ruled that a County is not an arm of the State in a Georgia case. *Northern Insurance Company of New York v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367. Therefore the lower courts erred in extending *Manders* and holding that a Georgia Deputy Sheriff is an "arm of the state" for the general law enforcement functions at issue in this case.

In addition, the proceedings below in this case did not establish who would pay a judgment, the state or

the county. The USDC Order essentially states that the payment of any damages award are irrelevant and this approach completely ignores the appropriate judicial standard of *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. at 1358 (1974)(overruled on other grounds by *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)) and *Travelers Indem. Co. v. School Bd. of Dade County, Fla.*, 666 F.2d 505, 509 (11th Cir. 1982), where both hold that entities are immune only if it is a "virtual certainty" that the state will foot the bill. *Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527-28 (11th Cir. 1990). Importantly, this is a fact question which must be determined in every case where Eleventh Amendment immunity is involved. *Id.* For the foregoing reasons the USDC erred in granting Eleventh Amendment Sovereign Immunity to Defendant.

II. The correct test for determining whether a political subdivision of Georgia is an "arm of the state" was not applied by the lower courts in deciding this case.

The Georgia Supreme Court's decision in the *Hines v. Georgia Ports Authority*, 278 Ga. 632, 604 S.E.2d 189 serves to correct the District Court's rejection of the *Vierling v. Celebrity Cruises* analysis by making it the applicable standard for use when evaluating the application of sovereign immunity of Georgia State agencies. *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003) In *Vierling*, the Eleventh Circuit held that the Port Authority was not entitled to sovereign immunity as it was financially self-sufficient, generated its own revenues, and paid its own debts. "Furthermore, (the Eleventh Circuit reasoned), **"the state has no control over the operation of the facility and Florida law treats the Port Authority, as an entity of the county, not of the state."** *See Vierling v. Celebrity Cruises*, 339 F.3d at 1315 (*Emphasis added*).

Because of the Georgia Supreme Court's adoption of *Vierling* in *Hines v. Georgia Ports Authority*, *supra*, at page 93 certiorari should be granted and the District Court's September 14, 2007, order as affirmed in the appellate court must be reversed because this Court in *Northern Insurance Company of New York*, *supra*, the Court has already tacitly recognized that Chatham County cannot serve as an arm of the state under the *Vierling* test. In order to remove any confusion as to why Chatham County is not an "arm of the state" under the *Vierling* test the Plaintiffs provide the following review of the applicable facts and law.

In *Vierling*, the Eleventh Circuit stressed the importance of determining whether the state or the county would ultimately be responsible for satisfying any adverse judgment. 339 F.3d at 1314. Specifically the Eleventh Circuit noted:

> Although no single factor is dispositive, the third factor, the source of the entity's funds and responsibility for satisfying judgments, is "of considerable importance." *Doe*, 519 U.S. at 430, 117 S. Ct. at 904. "Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Id.* at 429, 117 S. Ct. at 903-04 (*internal quotation marks omitted*).

339 F.3d at 1314. (*citing Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)).

The other two factors of the *Hines/Vierling* test "are mixed but tend to weigh towards a finding of no immunity" just as they did in *Hines* when no sovereign immunity was found even though the Ports Authority was "performing an essential governmental function."

CONCLUSION

The Defendant deputy sheriff was acting as a county official and in violation of the strictures of the U.S. Constitution, Articles, IV, XI and XIV and 42 U.S.C.A. § 1983 and clearly showed actual malice all of which eliminate his entitlement to eleventh amendment immunity. The trial and appellate courts erred in granting him eleventh amendment sovereign immunity contrary to ruling of the Georgia Supreme Court, the highest court in Georgia and of this Honorable Court.

Respectfully submitted,

FRED S. CLARK
CLARK AND CLARK
P.O. Box 8151
Savannah, GA 31412
(912) 233-0300

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 10, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14506
Non-Argument Calendar

CHARLES SCOTT,

Plaintiff-Appellant,

versus

DEPUTY SHERIFF JAMES MERCIER,
Deputy Sheriff of Brantley,

Defendant-Appellee.

(March 10, 2008)

Before BIRCH, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Charles Scott appeals the district court's grant of summary judgment in this 42 U.S.C. § 1983 action against James Mercier, the Deputy Sheriff of Brantley County, Georgia. In his complaint, Scott alleged Mercier, while acting under color of state law, entered his

property without permission and, when Scott declined Mercier's commands, attacked and beat him. Scott explicitly sued Mercier only in his official capacity, asserting various state law torts and a § 1983 action alleging a violation of Scott's civil rights. Mercier first moved for summary judgment on February 12, 2007. During a status conference on June 29, 2007, Mercier asked to file an amendment to his summary judgment motion. The district court instructed Mercier to file his amendment within three weeks, and allowed Scott two weeks to respond. Mercier filed his amended motion on July 20, 2007, arguing that sovereign immunity barred the suit. Scott replied on July 30, 2007. On September 14, 2007, the district court granted summary judgment in favor of Mercier on the § 1983 claims, finding Mercier was entitled to Eleventh Amendment sovereign immunity as a state actor under *Manders v. Lee*, 338 F.3d 1304 (11th Cir.2003) and, alternatively, that Scott had failed to challenge an official policy or practice of the Brantley County Sheriff's Office. The district court declined to exercise supplemental jurisdiction over Scott's state law claims and dismissed them without prejudice.

Appendix A

We have thoroughly reviewed the record and the briefs in this case and find no merit to any of Scott's issues on appeal.[1] We affirm for the reasons set forth in the district court's well-reasoned order of September 14, 2007.

AFFIRMED.

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1. We decline to address Scott's argument that the district court erred in considering Mercier's amended summary judgment motion asserting sovereign immunity. Scott argues the court permitted Mercier to amend his summary judgment motion well outside the date set by the original Scheduling Order without demonstrating the good cause required by Fed. R. Civ. Pro. 16(b)(4). We will not address this argument because Scott was given ample opportunity to raise it below both at the status conference and when he responded to Mercier's amended motion. By failing to do so, Scott waived the argument. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir.2004) ("[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (quotations omitted)).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, WAYCROSS DIVISION DATED AND FILED SEPTEMBER 14, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF GEORGIA WAYCROSS DIVISION

CIVIL ACTION

NO. CV506-33

CHARLES SCOTT,

Plaintiff,

v.

JAMES MERCIER,

Defendant.

ORDER

Plaintiff, Charles Scott, filed suit against Defendant, Brantley County Deputy Sheriff James Mercier, in his official capacity, alleging excessive use of force in violation of the Fourth Amendment, and related state law claims.

Presently before the Court is Mercier's motion for summary judgment, as amended. Because Scott's Fourth Amendment claim is barred by the doctrine of

sovereign immunity, Mercier's motion will be **GRANTED** as to the federal claim. Scott's state law claims' will be **DISMISSED** without prejudice.

BACKGROUND

Viewed in the light most favorable to Scott, the facts are as follows. On September 12, 2005, Charles and Marlene Scott were baby-sitting the three minor children of Karen and Shannon Gibson. According to Plaintiff, Karen Gibson had primary custody of the children, and the Scotts were watching the children at Karen Gibson's request, or with her consent. Earlier that day. Karen Gibson was arrested and asked her friend, Angela, to watch the children. Charles and Marlene Scott are Angela's parents.

Angela left the children at the Scotts' residence to try to get Karen Gibson out of jail. Later that day, Deputy Mercier drove to the Scotts' residence in his patrol car, with Shannon Gibson following behind in his private car, to retrieve the children and place them in Shannon Gibson's custody. Deputy Mercier came to the Scotts' chain link fence and informed Charles Scott that he had come to get Mr. Gibson's children.

Plaintiff explained to Defendant that he did not feel comfortable releasing the children from his charge without a warrant or some other official document regarding the children and their custody. Scott informed Mercier that he would not permit the Deputy to enter his house without any written paperwork regarding the children or other governmental authorization to do so.

At that point, Scott contends that Mercier shoved the gate into him, which knocked Plaintiff back and cut his arm. Scott asked Mercier to call the Sheriff to the scene, but Mercier refused, stating that he "was the law." Scott also alleges that Mercier told Scott that he was going into Scott's home "one way or another" to get the children. Thereafter, without invitation, a warrant, or other court order, Mercier came onto the Scotts' property and again informed them that he intended to enter their home to retrieve the Gibson children.

Both men walked to the porch, and Scott told Mercier that he planned to call the Sheriff himself. Scott avers that when he turned to open the door, Mercier blind-sided him and shoved his face into the wall of his home. Although Scott was not under arrest, and had not been accused of committing any crime, Mercier attempted to spray Scott with mace. Defendant did not warn Plaintiff to stay out of his home, or that he was going to be restrained in any way, until after Plaintiff was injured and threatened with mace. As a result of Mercier's attack, Scott suffered a broken nose, bruises, and lacerations on his face and arm.

After this confrontation, Marlene Scott told Mercier that if he would calm down, she would go into the house and bring the children out. After Mrs. Scott retrieved the children, they got into their father's car and left.

On May 5, 2006, Scott filed this action against Mercier, and ten months later, Scott amended his complaint. According to the amended complaint, Scott

asserts a Fourth Amendment claim, pursuant to 42 U.S.C. § 1933, and state law tort claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress.[1]

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions *on* file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Facts are "material" if they could affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court must view the facts in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp* ., 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in his favor . . .", *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir, 1991)(en banc)(internal quotation marks omitted).

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1. According to a stipulation of the parties, Scott has sued Mercier in his official capacity only. Dkt. No. 48., Ex. A at ¶ 23. *See Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1935). Because Scott does not seek to recover against Mercier in his personal capacity, the doctrine of qualified immunity does not apply to Scott's federal claim. *Id.* at 155-167.

Appendix B

DISCUSSION

Title 42, United States Code, Section 1983, allows individuals to sue state actors in federal court for constitutional violations. *Monroe v. Pape*, 365 U.S. 167, 175-84 (1961). In pertinent part, the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [.]" U.S. Const. amend. IV.

The Eleventh Amendment provides immunity to the several states against federal claims brought in federal court; "T he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI.

Notwithstanding the express language of the Amendment, the doctrine of sovereign immunity has been interpreted to protect a state from suit by its own citizens as well. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). As a remnant of preratification sovereignty, sovereign immunity extends only to states and entities that act as "arms" of the states, *Alden v. Maine*, 527 U.S. 706, 713 (1999). Municipal corporations, such as counties, are not protected by the Eleventh Amendment. *Howlett v. Rose*, 496 U.S. 356, 376 (1990). A suit naming a government official in his official capacity is actually a suit against the governing entity itself. *Graham*, 473 U.S. at 165-65.

Appendix B

Mercier argues that he is entitled to Eleventh Amendment immunity on Scott's unlawful seizure and excessive use of force claim. "Whether a defendant is an 'arm of the state' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Wanders v. Lee*, 338 F.3d 1304, 1309 (11th Cir.2003). In making this determination, the Court considers four factors; (1) how the entity is defined by state law, (2) the State's degree of control over the entity, (3) the source of the entity's funding, and (4) who is responsible for judgments against the entity. *Id.*

The Georgia constitution designates the sheriff as a "county officer." Ga. Const. art. IX, § 1, ¶ 3(a)-(b). Nonetheless, under Georgia law, the sheriff is not a subunit of the county in which it operates. Rather, the sheriff's office is separate and independent from the county commission, and is subject to the control of the state legislature.

Further, counties exercise no control over the use of force policies of the sheriff's office. *Id.* at 1310. Instead, the sheriff wears a "state hat" when creating and implementing his use of force policy. The first factor, the way Georgia law defines the Sheriff's office, weighs in favor of Eleventh Amendment immunity. *Id.* at 1319, The second factor also militates in favor of immunity because the State controls the Sheriff's "duties, training, and disciplined" *Id.* at 1322.

The third factor requires the Court to consider the source of funding for Sheriff's office. Pursuant to Georgia law, the County bears most of the burden of funding the Sheriffs operations. However, the County's financial control over the Sheriff is attenuated by virtue of the fact that the County must provide enough money to allow the Sheriff to discharge his legal duties, and the County Commission cannot dictate how these funds are spent. *Id.* at 1323. Thus, the third factor is not determinative; consideration of the Sheriff's funding cuts both ways.

Turning to the fourth factor, the County would not be directly responsible for any judgment against Mercier. *Id.* at 1326. However, the Sheriff would have to pay any adverse judgment out of his budget, which would implicate County funds indirectly. *Id.* at 1327. Even where the state treasury is not affected by an adverse judgment, this factor is not outcome-determinative in the Eleventh Amendment analysis. That is, immunity may still apply even where the fourth factor does not weigh strongly in the balance. *Id.* at 1327-23.

Considering all these factors, the Eleventh Circuit has found that the Sheriff is an "arm of the state" when the design and application of the Sheriff's use of force policy at the County jail is at issue, *Id.* at 1308-28. While *Manders* concerned the Sheriff's use of force policy at the jail, there is no significant distinguishing factor present in this case that would permit the Court to avoid the result of *Manders.*

Appendix B

Deputy Mercier was attempting to resolve a civil dispute involving the custody of minor children, a matter governed by state law. Ga.Code Ann. §§ 19-9-1-19-9-104. Scott ha3 not alleged that any County ordinance was implicated, that the Brantley County Board of Commissioners had any control over Deputy Mercier's use of force, or that Mercier's actions were done at the behest of any County official. *See Mladek v. Day*, 293 F.Supp.2d 1297, 1304 (M.D.Ga .2003). Contrary to Scott's suggestion, because Mercier acted as a state official at all relevant times, Brantley County has no liability for any Fourth Amendment violation committed by Mercier.

Moreover, local officials, like deputy sheriffs, may be sued under § 1983 in their official capacities only where the alleged unconstitutional action is taken pursuant to official policy or governmental custom. A local government may not he held responsible under § 1983 on a respondeat superior basis. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 653, 690-94 (1978). Thus, Scott's claim also fails because he does not aver that Mercier's excessive use of force was done pursuant to the official policy or practice of the Brantley County Sheriff's office, *See Kicklighter v. Herrin*, No. CV206-77, 2007 WL 2248089, at *8-9 (S.D.Ga. July 31, 2007).

Scott's Fourth Amendment claim against Mercier is foreclosed by *Manders* and *Monell*.

Appendix B

CONCLUSION

For the reasons explained above, Mercier's motion for summary judgment is **GRANTED** as to the Fourth Amendment claim. Dkt. Nos. 17 & 41. The Court declines to exercise supplemental jurisdiction over Plaintiff's pending state law claims. 28 U.S.C.A. § 1367(c)(3) (1993). Consequently, Scott's claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress are **DISMISSED** without prejudice. The Clerk is directed to enter judgment accordingly.

SO ORDERED, this 14 day of September, 2007.

s/ [illegible]
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENT CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 3, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14506-BB

CHARLES SCOTT,

Plaintiff-Appellant,

versus

DEPUTY SHERIFF JAMES MERCIER,
Deputy Sheriff of Brantley,

Defendant-Appellee.

Before BIRCH, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE